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No. 92-1143

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN T. STONE, JR. AND ROY A. WUJKOWSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that petitioner Wujkowski, the sole officer and employee of a corporation, could not invoke the Fifth Amendment privilege against compulsory self-incrimination to avoid compliance with a subpoena seeking production of corporate documents.

2. Whether the court of appeals erred in determining that petitioners did not have a Fifth Amendment privilege to refuse production of personal records when incrimination could only result from the content of documents that were prepared voluntarily and not from the compelled act of production.

3. Whether the lower courts erred in determining that subpoenas seeking calendars with business-related entries were enforceable because petitioners failed to meet their burden of establishing that the calendars constituted personal records protected by the privilege against self-incrimination.

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OPINIONS BELOW

The first opinion of the district court (Pet. App. 26a-27a) is unreported. The opinion of the court of appeals on petitioners' first appeal (Pet. App. 8a-18a) is reported at 929 F.2d 981. The opinion of the district court on remand (Pet. App. 19a-24a) is unreported. The opinion of the court of appeals on petitioners' second appeal (Pet. App. 1a-7a) is reported at 976 F.2d 909.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1992. The petition for a writ of certiorari

was filed on January 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action to enforce a subpoena against the officers of two government contractors. For several years, the Department of Energy (DOE) has been investigating the two corporations in order to determine whether they provided illegal gratuities to DOE employees. Petitioners Stone and Wujkowski are officers of one of the corporations, Technology and Management Services, Inc. Wujkowski is also the owner and sole employee of the other contractor, Ashford Associates, Inc. Pet. App. 9a-10a.

As part of DOE's investigation, it issued subpoenas *duces tecum* to both petitioners. The subpoenas requested three categories of documents at issue. First, the subpoena directed to Wujkowski demanded that he produce business records related to Ashford Associates, Inc., his solely owned corporation. Second, the subpoena also requested Wujkowski to produce records related to the use of a beach house that he owned. DOE suspected that Wujkowski had allowed DOE employees to use the beach house in return for preferential treatment. Pet. App. 10a. Third, both petitioners were requested to produce

> all original desk and pocket calendars, appointment books, planner schedules, and daily meeting logs maintained or kept on a personal and/or business basis for calendar years 1985, 1986, 1987, 1988, and for the first three quarters of 1989.

Ibid.

2. Petitioners refused to comply with the subpoenas, claiming that the Fifth Amendment privilege against compulsory self-incrimination excused them from compliance. DOE filed a petition to enforce the subpoenas in the United States District Court for the Eastern District of Virginia. The district court originally ordered petitioners to submit their calendars and schedules for in camera review, and petitioners complied. In response to the government's motion for reconsideration, however, the court concluded that in camera review was unnecessary, released the calendars and schedules to the government, and ordered petitioners to comply with the subpoenas. Pet. App. 26a-27a.

Citing *Baltimore City Dep't of Social Services* v. *Bouknight*, 493 U.S. 549 (1990), and *Fisher* v. *United States*, 425 U.S. 391, 410 (1976), the district court concluded that the contents of the documents were irrelevant because the documents themselves were not created under compulsion. Pet. App. 26a. Although production of the documents was compulsory, the court held that the Fifth Amendment did not apply to the production of business-related notations (Pet. App. 27a (citing *Braswell* v. *United States*, 487 U.S. 99, 109 (1988)), and that the revelation of any personal notations added nothing significant to what the government would learn from unprivileged sources (Pet. App. 27a (citing *Fisher*, 425 U.S. at 411)).

Subsequently, the district court ordered Wujkowski to produce subpoenaed documents related to Ashford Associates and to the beach house. Wujkowski refused to comply with that order and was held in contempt. Pet. App. 11a.

3. The court of appeals consolidated the appeals from the district court's orders, vacated those orders, and remanded for further proceedings. Pet. App. 8a-18a.

The court of appeals observed the settled rule that corporations and their officers may not invoke the Fifth Amendment to resist production of corporate records. Pet. App. 12a-13a. The court of appeals concluded, however, that the district court should have examined the calendars and beach house records more extensively to determine whether those records were personal or corporate in character. Pet. App. 13a-14a. The court of appeals concluded that petitioners had the right, but also the burden, "to prove the nature of the documents and the capacity in which they held them." Pet. App. 14a. The court of appeals accordingly directed the district court on remand to consider a number of factors in evaluating whether the documents were personal or corporate, including:

> who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to or in furtherance of the conduct of the corporation's business.

Pet. App. 15a (endorsing the test in *Grand Jury Subpoena Dated April 23, 1981 Witness* v. *United States*, 657 F.2d 5, 8 (2d Cir. 1981)).

The court further held that even if the appointment books and beach house records might be found to be personal records on remand, compliance with the subpoenas would still be required unless petitioners could establish that "the act of producing these items

would entail testimonial self-incrimination." Pet. App. 16a. The court considered it well settled that petitioners did not have any Fifth Amendment right to resist production of subpoenaed documents based upon their potentially incriminating contents. Pet. App. 12a. Instead, petitioners would have to demonstrate, under the "now familiar inquiry" that "producing the items would testify to their authenticity, existence, or possession by the defendant." Pet. App. 16a (citing *Fisher*, 425 U.S. at 410). Moreover, the court continued, even if petitioners could show that production would testify to the authenticity, existence, or possession of the documents, DOE could still enforce the subpoena upon showing that these issues were foregone conclusions. Pet. App. 16a (citing *United States* v. *Doe*, 465 U.S. 605, 614 n.13 (1984)).

Finally, the court of appeals directed the district court to consider whether the act of production doctrine would apply to the documents of Ashford Associates. Those documents were concededly corporate and Wujkowski would concededly act in a corporate representative capacity in producing them as the sole employee and officer of that corporation. Pet. App. 16a n.1. The court observed, however, that the availability of a personal privilege in this setting had been left open in *Braswell*, 487 U.S. at 118 n.11.

4. On remand, the district court carefully reviewed the documents and ordered that the subpoenas be enforced in their entirety. Pet. App. 19a-24a. First, applying the standard established by the court of appeals, the district court held that petitioners had not met their burden of establishing that the pocket calendars at issue were personal records. *Id.* at 20a-

22a. Instead, petitioners had simply submitted affidavits containing "conclusory" characterizations of the calendars that did not explain specific entries. *Ibid.* Petitioner Stone, for example, conceded that his pocket diaries contained business entries (*id.* at 20a), and, the court found, all he established in his affidavit was that "over a period of four and three-quarter years there are some unspecified personal, non-business related entries in the diaries" (*id.* at 21a). The court determined that petitioner Wujkowski had also failed to establish that specific entries in his calendars were personal. *Id.* at 22a. The court accordingly determined that the calendars should be treated as corporate records that were not protected by the act-of-production privilege.

The district court reached a different conclusion with respect to the beach house records. Based on its review of the evidence, the court found that these records were held by petitioner Wujkowski in his personal capacity. Pet. App. 22a. Nevertheless, the court held that the act of production would not be incriminating because the authenticity and existence of the documents were foregone conclusions, and the records were available from other sources, such as utility companies. Pet. App. 22a-23a (citing *Fisher*, *Doe*, and *Bouknight*). Finally, as to the records of Ashford Associates, the district court followed *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985), and concluded that Wujkowski could not assert the act-of-production privilege regarding corporate records, even though he is the sole employee and officer of the corporation. Pet. App. 23a-24a.

5. The court of appeals unanimously affirmed in a per curiam opinion. The court agreed with the district court that petitioners had failed to meet their burden of establishing the personal nature of their calendars. Pet App. 4a. Further, the court held that the act of producing the only personal records at issue—the beach house documents—would not be incriminating, given the facts found by the district court. Pet. App. 4a-6a.

Finally, the court of appeals concluded, in conformance with decisions in other circuits (Pet. App. 7a), that Wujkowski's status as sole employee and officer of Ashford Associates did not excuse him from producing company documents that he held in his representative capacity. Although Ashford Associates was a one-person operation, it remained a corporation distinct from Wujkowski himself. If Wujkowski had elected the unincorporated sole proprietorship form, he could have claimed the act-of-production privilege, but he had chosen the corporate form and could not now disregard that form to shield his business records from production. Pet. App. 6a-7a.

ARGUMENT

Petitioners urge a variety of claims that were rejected by the courts below. The court of appeals correctly applied this Court's precedents to the facts of this case, and none of the courts' holdings conflict with any decision of another court of appeals. Further review is therefore unwarranted.

1. Petitioner Wujkowski first claims that the court of appeals erred in holding that he must produce the documents of Ashford Associates that he holds in a corporate representative capacity. The court of

appeals correctly held, however, that Wujkowski may not claim the act-of-production privilege with respect to those documents.

a. This Court has long held that artificial entities such as corporations and partnerships may not invoke the Fifth Amendment privilege against self-incrimination. See *Braswell* v. *United States*, 487 U.S. 99, 102, 104 (1988) (proposition "well established"; rule has a "lengthy and distinguished pedigree" dating back to *Hale* v. *Henkel*, 201 U.S. 43 (1906)). A corporate custodian may not resist a subpoena for corporate records by invoking his or her personal privilege against self-incrimination, because such an officer holds the documents in a corporate representative capacity rather than in a personal capacity. See, *e.g.*, *Braswell*, 487 U.S. at 109-110; *Bellis* v. *United States*, 417 U.S. 85, 100-101 (1974); *United States* v. *White*, 322 U.S. 694, 699 (1944); *Dreier* v. *United States*, 221 U.S. 394, 400 (1911); *Wilson* v. *United States*, 221 U.S. 361, 385 (1911). In short, "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Braswell*, 487 U.S. at 108 (quoting *Bellis*, 417 U.S. at 100).

Although the government may use the fact that a particular person produced the records against the corporation, it may not use that fact against the individual custodian (assuming that the custodian is otherwise entitled to invoke the privilege against compelled testimony). *Braswell*, 487 U.S. at 118. This limitation is "a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his

representative capacity." *Id.* at 118 n.11. On the other hand, the government *may* use the *corporation*'s act of production against the custodian. The jury may find that the corporation's act of production proves the authenticity of the records and that a prominent corporate officer who has become a criminal defendant either possessed those records or knew of them. *Id.* at 118. But "[b]ecause the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case." *Ibid.*[1]

b. Here, petitioner Wujkowski claims that because he is the sole owner, employee, and officer of Ashford Associates, a jury would necessarily conclude that he produced the records of that corporation and would

[1] In *Braswell*, this Court held that the agency rationale supporting the collective entity rule survived the Court's holdings in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Doe*, *supra*, which replaced the earlier privacy-based interpretation of the Fifth Amendment with a standard based on compulsion of testimony. 487 U.S. at 109. The four dissenters in *Braswell* agreed with the majority that "collective entities have no Fifth Amendment self-incrimination privilege; that a natural person cannot assert such a privilege on their behalf; and that the contents of business records prepared without compulsion can be used to incriminate even a natural person without implicating Fifth Amendment concerns." 487 U.S. at 120 (Kennedy, J., joined by Brennan, Marshall, and Scalia, JJ., dissenting). In their view, however, the government should not be permitted to use the corporation's act of production against the custodian.

consider that act of production against him.[2] As the court of appeals noted (Pet. App. 6a), *Braswell*

> le[ft] open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

487 U.S. at 118 n.11. The courts below correctly concluded, however, that the logic of the artificial entity rule also extends to Ashford Associates.

The custodian of the records of a single-person corporation holds those records in a representative capacity. As this Court reasoned in *Braswell*,

> [a]rtificial entities such as corporations may act only through their agents * * * and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.

487 U.S. at 110.

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[2] Like Wujkowski, Braswell was the sole shareholder of one of his corporations, but, unlike Ashford Associates, Braswell's corporations had three officers. 487 U.S. at 101.

Ashford Associates is a one-person corporation that undertook the same obligations as larger corporations do, including the obligation to produce corporate documents. Wujkowski could have formed Ashford Associates as a sole proprietorship and retained Fifth Amendment protection. See *Doe*, *supra*. Instead he elected to create a corporation, with all the attendant benefits and burdens, including the requirement that employee agents produce documents upon government subpoena. Wujkowski's claim of privilege is thus tantamount to a claim of nonexistent corporate privilege. See *Braswell*, 487 U.S. at 110.

The court of appeals correctly concluded that no meaningful distinction exists between this case and *Braswell*. *Braswell* already holds that the government may use the corporation's act of production against an individual custodian, even though the custodian held a prominent position in the corporation. 487 U.S. at 118. If Wujkowski is prosecuted, the jury would similarly be told only that Ashford Associates produced the documents. As in *Braswell*, any nexus between him and the documents would result solely from Ashford Associates' production and inferences drawn from other evidence in the case regarding Wujkowski's role in the corporation. *Ibid.* It is true that Braswell's wife and mother were nominally officers of Braswell's corporation and could have produced the documents. *Id.* at 101, 118 n.11. As a practical matter, however, *Braswell* is indistinguishable, because other evidence in that case showed that neither Braswell's wife nor his mother had any authority over business affairs. *Id.* at 101. Braswell's jury was thus equally likely to conclude that he

produced the records. A different result is not required on the facts of this case.[3]

c. Wujkowski does not contend that the decision below conflicts with any decisions of this Court or with those of other circuits. Since *Braswell* left this issue open, only two courts of appeals have considered whether the Fifth Amendment protects the act of producing the records of a single-person corporation. Both have held that it does not. Pet. App. 6a-7a; *United States* v. *Lawn Builders of New England, Inc.*, 856 F.2d 388, 394 (1st Cir. 1988) (citing *In re Grand Jury Proceedings (John Doe Co.)*, 838 F.2d 624, 627 (1st Cir. 1988)). Review of this issue would accordingly be premature. There is no conflict, and ten circuits have had no occasion to address this question since *Braswell* was decided.[4]

2. Both petitioners contend that the courts below erred in refusing to base Fifth Amendment protection

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[3] Wujkowski also attempts (Pet. 8) to draw support from *Braswell*'s reaffirmation of the holding in *Curcio* v. *United States*, 354 U.S. 118 (1957), that a custodian of corporate records may not be compelled to testify orally concerning those records. *Braswell*, however, confirmed that a custodian's production of corporate records is distinct from his or her oral testimony regarding that production; the latter is privileged while the former is not. 487 U.S. at 114. In this case, the government has never suggested that it desires to compel Wujkowski to testify concerning the production of the records of Ashford Associates.

[4] Furthermore, the issue does not recur with great frequency. Even small, closely held corporations ordinarily have more than one officer and one employee. For example, *Braswell* itself did not raise this issue because Mississippi law requires that corporations have three directors. See 487 U.S. at 101.

on the contents of the subpoenaed records.[5] This issue is firmly settled and does not merit review.

a. Petitioners argue that *Boyd* v. *United States*, 116 U.S. 616, 633-635 (1886), based Fifth Amendment protection on privacy interests, although they concede that "[d]icta in more recent Supreme Court decisions indicates that there has been an erosion of the scope of the *Boyd* doctrine." Pet. 12. In fact, as the court of appeals concluded, this Court's cases clearly establish that the Fifth Amendment protects only compulsory testimonial communications, not the contents of subpoenaed documents that were voluntarily created.

In *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court observed that much of *Boyd* had "not stood the test of time," *id.* at 407, that the Fourth Amendment foundation of the Fifth Amendment doctrine that

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[5] This argument applies to all the requested documents. The district court found (Pet. App. 20a-22a), and the court of appeals agreed (Pet. App. 4a), that both petitioners had failed to prove that their calendars were personal. Petitioners challenge that finding before this Court (Pet. 18-23), however, and appear to claim that the Fifth Amendment protects their acts of producing the calendars and their privacy interest in the contents of those calendars.

As regards the beach house records, both lower courts found (Pet. App. 4a, 22a), that Wujkowski held those records in his personal capacity. Wujkowski, however, has not challenged the lower courts' conclusion (Pet. App. 4a-5a, 22a-23a) that the Fifth Amendment does not protect his act of producing the beach house records because the existence, possession, and authenticity of those records are foregone conclusions. Rather, Wujkowski's sole claim regarding the beach house records is that the Fifth Amendment protects his privacy interest in their contents.

production of private papers may not been compelled had been "washed away," *id.* at 409, and that *Boyd* was thus a "rule searching for a rationale," *ibid.* The Court emphasized that the Fifth Amendment privilege protects only against compulsory testimonial communications, *ibid.*, and is not a "general protector of privacy," *id.* at 401. See also *Braswell*, 487 U.S. at 121 (Kennedy, J., dissenting) (noting, with approval, that the Court had rejected the essential premise of *Boyd* in *Fisher* and *Doe*, 465 U.S. at 610-611 & n.8). Since *Fisher*, the Court has repeatedly held that the contents of records voluntarily committed to writing are not themselves compelled testimony; only the act of producing such documents is compelled and therefore potentially privileged. See, *e.g.*, *Doe*, 465 U.S. at 610-614; *Andresen* v. *Maryland*, 427 U.S. 463, 473-477 (1976).

In short, "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Baltimore City Dep't of Social Services* v. *Bouknight*, 493 U.S. 549, 555 (1990). Yet petitioners advance that very sort of claim: they argue that the Fifth Amendment protects them because of the supposedly private and incriminating contents and nature of the documents demanded. The court of appeals correctly determined that this Court's decisions foreclose such claims. Pet. App. 12a.

b. Petitioners do not claim that the decision below conflicts with the decision of any other circuit. Petitioners in fact concede (Pet. 13) that "several Circuits have reached the conclusion that the Fifth Amendment affords no protection to the contents of

even personal documents." See *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989) (privilege not applicable to contents of any voluntarily prepared documents, including personal ones), cert. denied, 493 U.S. 1044 (1990); *In re Steinberg*, 837 F.2d 527, 528-530 (1st Cir. 1988) (describing erosion of *Boyd* doctrine; concluding that *Boyd* has been limited to apply rarely, if ever); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418 (9th Cir. 1985).[6] Petitioners' contention that the courts below failed to follow Fourth Circuit precedent (Pet. 13-14) is not a matter that warrants review by this Court, even if their contention were correct.[7] See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

3. Petitioners also contend that this Court should review the lower courts' determination that their pocket diaries and calendars were corporate records subject to production under the terms of the subpoenas at issue. This claim rests upon the application of settled legal principles to the facts of this case and does not raise any legal issue warranting review.

a. Petitioners' principal claim with respect to these records is that the district court did not conduct proceedings on remand in accordance with the legal standard established by the court of appeals

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[6] In *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (1991), the Eleventh Circuit also recognized that recent cases of this Court "represent a shift in Fifth Amendment jurisprudence from the privacy based rationale" of *Boyd*, but found it unnecessary to decide the scope of *Boyd*'s remaining vitality in that case.

[7] *United States* v. *(Under Seal)*, 745 F.2d 834 (4th Cir. 1984), on which petitioners rely, was subsequently vacated by this Court as moot. See 471 U.S. 1001 (1985).

in its first opinion, and simply presumed that the calendars at issue constituted corporate records. Pet. 19-20. The same panel of the court of appeals rejected that contention, however, in its subsequent affirmance of the district court's post-remand order. Pet. App. 4a. As the court of appeals noted, "[o]n remand the district court conducted two hearings, considered arguments of counsel and reviewed *in camera* the targeted documents and the affidavits of [petitioners]." *Ibid.* Based on that review, the court of appeals "agree[d] with the district court that Wujkowski and Stone did not meet their burden of establishing the personal nature of their diaries." *Ibid.* The factual conclusions of the district court were more than adequate to sustain the determination that petitioners did not meet their burden of establishing that these pocket calendars were held in their personal capacity.[8]

[8] Petitioners further contend that the procedures employed by the district court in conducting its inquiry were unfair because they believed that they would be permitted to supplement their affidavits with oral testimony. This issue is obviously inappropriate for review on certiorari. In any event, the proceedings were entirely fair. At the beginning of the hearing on July 26, 1991, petitioners' counsel asked for the "opportunity to demonstrate to the court that [the calendars] are not held in a representative capacity." Tr. 3-4. The district court responded that it "expect[ed] that to accompany [petitioners'] submission to the court." Tr. 4. Petitioners' counsel observed that the court might have questions when reading affidavits and examining the calendars *in camera* and want to hear from petitioners personally, "if [the court] wanted to hear from them to further explain or develop that." *Ibid.* The court merely responded "all right" and turned to counsel for the government for a response. *Ibid.* At the end of the

b. Petitioners also assert that the subpoenas were facially unenforceable because they requested calendars that were maintained on a "personal and/or business basis." Throughout the course of this litigation, however, the subpoenas have been construed to request calendars held in petitioners' corporate capacity. The whole purpose of the initial remand to the district court was to determine whether the calendars were subject to production as corporate records. Pet. App. 14a. Petitioners cannot claim that they were at any time misled, and any ambiguities in the subpoena are irrelevant because petitioners were never held in contempt for failure to produce the calendars. *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 221 (1951), and *In re Grand Jury Subpoena Duces Tecum*, 844 F.2d 202 (4th Cir. 1988), are therefore inapposite.

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hearing, the district judge noted that petitioners had "suggested that I may want to inquire of these individuals themselves," Tr. 7, but stated "I doubt that I will," *ibid.* Petitioners never requested again that the court receive oral testimony, nor did they seek reconsideration of the district court's ruling on this ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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